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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: FACEBOOK PRIVACY LITIGATION

Case No. 10-cv-02389-RMW

CLASS ACTION

**PLAINTIFFS' ADMINISTRATIVE
MOTION FOR LEAVE TO FILE
SUR-REPLY RE: DEFENDANT'S
MOTION TO DISMISS PLAINTIFFS
KATHERINE POHL AND WENDY
MARFEO FOR LACK OF
STANDING**

Date: December 18, 2016

Time: 9:00 a.m.

Courtroom: 6

Judge: Hon. Ronald M. Whyte

Trial Date: None Set

**PLAINTIFFS' ADMINISTRATIVE MOTION FOR LEAVE TO FILE SUR-REPLY RE: DEFENDANT'S
MOTION TO DISMISS PLAINTIFFS KATHERINE POHL AND WENDY MARFEO FOR LACK OF
STANDING**

CASE NO. 10-CV-02389-RMW

1 Pursuant to Local Civil Rules 7-11(a) and 7-3(d), Plaintiffs Wendy Marfeo and Katherine
 2 Pohl (collectively “Plaintiffs”) respectfully move for leave of Court to file a sur-reply to address a
 3 specific point made in Defendant Facebook, Inc.’s Reply in Support of Motion to Dismiss
 4 Plaintiffs Katherine Pohl and Wendy Marfeo for Lack of Standing, but which Facebook did not
 5 make in its original moving papers – specifically, that the Ninth Circuit has rejected the California
 6 Court of Appeal’s long-standing holding that even if a plaintiff cannot show ascertainable
 7 monetary damage for breach of a contract, she is entitled to nominal damages, “since the
 8 defendant’s failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct
 9 from the actual damages.” *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632, 337 P.2d 499 (1959),
 10 citing Cal. Civ. Code § 3360 (“When a breach of duty has caused no appreciable detriment to the
 11 party affected, he may yet recover nominal damages.”); *see* Dkt. 281 at 13.

12 Attached hereto as Exhibit 1 is Plaintiffs’ proposed Sur-Reply re Defendant’s Motion to
 13 Dismiss Plaintiffs Katherine Pohl and Wendy Marfeo for Lack of Standing. The Declaration of
 14 Kassra P. Nassiri in Support of Plaintiffs’ Administrative Motion for leave to file Sur-Reply re
 15 Defendant’s Motion to Dismiss Plaintiffs Katherine Pohl and Wendy Marfeo for Lack of Standing
 16 is filed concurrently herewith.

17 Good cause therefore exists to grant Plaintiffs’ request. “Once a reply is filed, no
 18 additional memoranda, papers or letters may be filed without prior Court approval.” Civil Local
 19 Rule 7-3(d). However, it is well settled that new arguments cannot be made for the first time in a
 20 reply brief. *See Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 843 n.6 (9th
 21 Cir. 2004); *Jones v. Déjà vu, Inc.*, No. 05-0997 BZ, 2005 WL 1629941, at *2 (N.D. Cal. July 6,
 22 2005). Plaintiffs believe that it will benefit the Court and all parties to address these matters
 23 briefly in writing before the hearing, rather than for the first time at the hearing. This Court
 24 previously has permitted the filing of sur-replies to both address new arguments and correct the
 25 record. *See Universal Trading & Investment Co. v. Kiritchenko*, No. C 99 3073 MMC, 2006 WL
 26 515625 (N.D. Cal. Feb. 28, 2006).

27 - 1 -

28 **PLAINTIFFS’ ADMINISTRATIVE MOTION FOR LEAVE TO FILE SUR-REPLY RE: DEFENDANT’S
 MOTION TO DISMISS PLAINTIFFS KATHERINE POHL AND WENDY MARFEO FOR LACK OF
 STANDING**

CASE NO. 10-CV-02389-RMW

1 Plaintiffs' counsel contacted counsel for Facebook and sought Facebook's stipulation to
2 file a sur-reply pursuant to Local Rules 7-11(a) and 7-12. Facebook did not agree to stipulate to
3 the filing of a sur-reply. *See* Declaration of Kassra P. Nassiri, ¶¶ 4-5.

4 For the foregoing reasons, Plaintiffs respectfully request leave to file the attached Sur-
5 Reply.

6
7 Dated: December 11, 2015

NASSIRI & JUNG LLP

8 /s/ Kassra P. Nassiri

9 Kassra P. Nassiri

Attorneys for Plaintiffs and the Putative Class